

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

8 CYNTHIA E. ALFORD,
9 Plaintiff,
10 v.
11 JO ANNE B. BARNHART,
Commissioner of Social
Security,
13 Defendant.
14)
) No. CV-05-166-CI
)
) ORDER DENYING PLAINTIFF'S
) MOTION FOR SUMMARY JUDGMENT
) AND DIRECTING ENTRY OF
) JUDGMENT FOR DEFENDANT
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)

15 BEFORE THE COURT are cross-Motions for Summary Judgment (Ct.
16 Rec. 16, 19), submitted for disposition without oral argument on
17 February 6, 2006. Attorney Maureen J. Rosette represents Plaintiff;
18 Special Assistant United States Attorney Daphne Banay represents
19 Defendant. The parties have consented to proceed before a
20 magistrate judge. (Ct. Rec. 6.) After reviewing the administrative
21 record and the briefs filed by the parties, the court **DENIES**
22 Plaintiff's Motion for Summary Judgment and directs entry of
23 judgment for Defendant.

24 Plaintiff, born June 24, 1953, was 49-years-old at the time of
25 the administrative hearing. She was 5'4" tall and weighed 220
26 pounds. (Tr. at 550-551.) She previously filed an application for
27 disability benefits, which was denied by the ALJ on March 21, 2001.

1 There was no appeal or request to reopen that decision. Plaintiff
2 then filed an application for Supplemental Security Income benefits
3 on April 24, 2001, alleging disability as of October 15, 1997, due
4 to leg and heart problems. (Tr. at 406-412.) Plaintiff had a high
5 school education and past relevant work as a salad maker,
6 secretary, telemarketer, hotel maid, switchboard operator, and other
7 short term, temporary jobs. Following a denial of benefits at the
8 initial stage and on reconsideration, a hearing was held before
9 Administrative Law Judge Paul Gaughen (ALJ). In 2003, the ALJ
10 denied benefits; review was denied by the Appeals Council. This
11 appeal followed. Jurisdiction is appropriate pursuant to 42 U.S.C.
12 § 405(g).

13 **ADMINISTRATIVE DECISION**

14 The ALJ concluded Plaintiff had not engaged in substantial
15 gainful activity and suffered from severe impairments, but those did
16 not meet the Listings. (Tr. at 359.) Her impairments included mild
17 aortic regurgitation, obesity and osteoarthritis/degenerative joint
18 disease of the knees and lumbar spine. Plaintiff's testimony was
19 not found fully credible. The ALJ found she had a residual capacity
20 for light work with occasional climbing of ramp/stairs, balancing,
21 kneeling, crouching, crawling, or stooping, and no climbing of
22 ladder/rope/scaffolds or work around hazards. Plaintiff was not
23 found to be precluded from performing her past relevant work as a
24 secretary, accounts payable clerk, or switchboard operator. (Tr.
25 at 359.) The ALJ concluded Plaintiff was not disabled.

26 **ISSUES**

27 The question presented is whether there was substantial
28 evidence to support the ALJ's decision denying benefits and, if so,

1 whether that decision was based on proper legal standards.
 2 Plaintiff contends the ALJ erred when he (1) concluded Plaintiff's
 3 mental impairments were non-severe, (2) concluded she had the
 4 residual capacity to perform a full range of light work, and (3)
 5 relied on the opinion of the consulting physician.

6 STANDARD OF REVIEW

7 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
 8 court set out the standard of review:

9 The decision of the Commissioner may be reversed only if
 10 it is not supported by substantial evidence or if it is
 11 based on legal error. *Tackett v. Apfel*, 180 F.3d 1094,
 1097 (9th Cir. 1999). Substantial evidence is defined as
 12 being more than a mere scintilla, but less than a
 13 preponderance. *Id.* at 1098. Put another way, substantial
 14 evidence is such relevant evidence as a reasonable mind
 15 might accept as adequate to support a conclusion.
Richardson v. Perales, 402 U.S. 389, 401 (1971). If the
 16 evidence is susceptible to more than one rational
 17 interpretation, the court may not substitute its judgment
 18 for that of the Commissioner. *Tackett*, 180 F.3d at 1097;
Morgan v. Comm'r of Soc. Sec. Admin. 169 F.3d 595, 599
 (9th Cir. 1999).

19 The ALJ is responsible for determining credibility,
 20 resolving conflicts in medical testimony, and resolving
 21 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
 22 Cir. 1995). The ALJ's determinations of law are reviewed
 23 *de novo*, although deference is owed to a reasonable
 24 construction of the applicable statutes. *McNatt v. Apfel*,
 25 201 F.3d 1084, 1087 (9th Cir. 2000).

26 SEQUENTIAL PROCESS

27 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
 28 requirements necessary to establish disability:

Under the Social Security Act, individuals who are
 "under a disability" are eligible to receive benefits. 42
 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
 29 medically determinable physical or mental impairment"
 which prevents one from engaging "in any substantial
 gainful activity" and is expected to result in death or
 last "for a continuous period of not less than 12 months."
 42 U.S.C. § 423(d)(1)(A). Such an impairment must result
 from "anatomical, physiological, or psychological

1 abnormalities which are demonstrable by medically
 2 acceptable clinical and laboratory diagnostic techniques."
 3 42 U.S.C. § 423(d)(3). The Act also provides that a
 4 claimant will be eligible for benefits only if his
 5 impairments "are of such severity that he is not only
 6 unable to do his previous work but cannot, considering his
 age, education and work experience, engage in any other
 kind of substantial gainful work which exists in the
 national economy" 42 U.S.C. § 423(d)(2)(A).
 Thus, the definition of disability consists of both
 medical and vocational components.

7 In evaluating whether a claimant suffers from a
 8 disability, an ALJ must apply a five-step sequential
 9 inquiry addressing both components of the definition,
 until a question is answered affirmatively or negatively
 in such a way that an ultimate determination can be made.
 10 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
 11 claimant bears the burden of proving that [s]he is
 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
 12 1999). This requires the presentation of "complete and
 detailed objective medical reports of h[is] condition from
 licensed medical professionals." *Id.* (citing 20 C.F.R. §§
 13 404.1512(a)-(b), 404.1513(d)).

ANALYSIS

1. Severe Impairment

16 Plaintiff contends the ALJ erred when he rejected Dr. Pollack's
 17 opinion which included several limitations. Dr. Pollack diagnosed
 18 somatoform disorder with the following moderate functional
 19 limitations: (1) maintaining attention and concentration for
 20 extended periods; (2) completing a normal workday or work week; (3)
 21 interacting appropriately with the public; (4) accepting
 22 instructions and responding appropriately to criticism from
 23 supervisors; (5) maintaining socially appropriate behavior; and (6)
 24 adhering to basic standards of neatness and cleanliness. Defendant
 25 responds the ALJ correctly relied on the findings of examining
 26 physician Dr. Toews, who concluded Plaintiff would have only slight
 27 limitations with the possibility of malingering. He also noted "she
 28 had no difficulty remembering simple instructions and was probably

1 able to remember detailed" as well, had normal attention and
2 concentration and working memory, and presented as an "open,
3 gregarious individual" who "would have no difficulty relating to co-
4 workers or tolerating supervision." (Tr. at 356.)

5 At step two of the sequential process, the ALJ must conclude
6 whether Plaintiff suffers from a "severe" impairment, one which has
7 more than a slight effect on the claimant's ability to work. To
8 satisfy step two's requirement of a severe impairment, the claimant
9 must prove the existence of a physical or mental impairment by
10 providing medical evidence consisting of signs, symptoms, and
11 laboratory findings; the claimant's own statement of symptoms alone
12 will not suffice. 20 C.F.R. § 416.908. The effects of all symptoms
13 must be evaluated on the basis of a medically determinable
14 impairment which can be shown to be the cause of the symptoms. 20
15 C.F.R. § 416.929. Once medical evidence of an underlying impairment
16 has been shown, medical findings are not required to support the
17 alleged severity of pain. *Bunnell v. Sullivan*, 947 F.2d 341, 345
18 (9th Cir. 1991). However, an overly stringent application of the
19 severity requirement violates the statute by denying benefits to
20 claimants who do meet the statutory definition of disabled. *Corrao*
21 v. *Shalala*, 20 F.3d 943, 949 (9th Cir. 1994). Thus, the
22 Commissioner has passed regulations which guide dismissal of claims
23 at step two. Those regulations state an impairment may be found to
24 be not severe *only* when evidence establishes a "slight abnormality"
25 on an individual's ability to work. *Yuckert v. Bowen*, 841 F.2d 303,
306 (9th Cir. 1988) (citing Social Security Ruling 85-28). The ALJ
must consider the combined effect of all of the claimant's
impairments on the ability to function, without regard to whether

1 each alone was sufficiently severe. See 42 U.S.C. § 423(d)(2)(B)
 2 (Supp. III 1991). The step two inquiry is a *de minimis* screening
 3 device to dispose of groundless or frivolous claims. *Bowen v.*
 4 *Yuckert*, 482 U.S. 137, 153-154.

5 In addressing Dr. Pollack's opinion, the ALJ noted:

6 The undersigned notes that the claimant has been diagnosed
 7 as suffering from a somatoform disorder. However, after
 8 consideration of the medical record, the undersigned
 9 concludes that the claimant suffers from no severe,
 medically determinable mental impairment, which imposes or
 has imposed more than slight limitations on her ability to
 perform work-related activities and/or has not lasted in
 severity for any continuous 12-month period.

10 In making this determination, the undersigned notes that
 11 although Dr. Pollack diagnosed the claimant with a
 12 somatoform disorder with some moderate functional mental
 13 limitations, treating and examining physicians have noted
 14 no unusual pain or pain-related behavior and as put forth
 in Dr. Toews report, would argue against such a diagnosis.
 The moderate functional mental limitations found by Dr.
 Pollack [noted above] ... are simply not supported by the
 overall medical evidence of record.

15 The undersigned assigns diminished weight to Dr. Pollack's
 16 analysis. Dr. Pollack opined that the claimant had
 17 revealed a preoccupation with physical complaints and a
 18 propensity of antisocial behaviors and while she might
 19 have antisocial impulses, that she was inclined to
 20 associate with others who acted out inappropriately and
 21 that her behavior could also be called inappropriate with
 22 him noting she had some rather unusual behaviors. In
 23 contrast to these observations and the aforementioned
 24 moderate mental limitations set forth by Dr. pollack, the
 25 undersigned first notes that the extensive examination by
 26 Dr. Toews revealed the claimant presented very differently
 than she tested, with good recall during the interview;
 easy and ready interaction; and anxiety and depression
 free (which would be unusual if one had memory deficits
 and perhaps some cognitive losses). Dr. Pollack also
 reported she had no difficulty remembering simple
 instructions and was probably able to remember detailed
 instructions; normal attention and concentration; normal
 working memory and that she presented as a rather open,
 gregarious individual that would have no difficulty
 relating to co-workers or tolerating supervision.

27 (Tr. at 356.) Additionally, the ALJ noted Plaintiff's report of
 28 daily activities (drives, balances a checkbook and pays bills, has

1 a number of friends she sees on a regular basis, gets along with
 2 people in general, enjoys movies, plays the guitar, sings, and goes
 3 camping (Tr. at 525)) was inconsistent with severe mental
 4 limitations as was the fact she had not sought or received any
 5 mental health treatment or used medication. (Tr. at 357.)

6 Neither Dr. Pollack nor Dr. Toews provided treatment; thus, for
 7 purposes of this analysis both are considered examining physicians.
 8 Dr. Pollack administered the WAIS-III and MMPI-2. (Tr. at 511.)
 9 Dr. Pollack tested Plaintiff's full scale IQ at 87, low average
 10 intelligence. (Tr. at 513.) Her MMPI scores were valid with
 11 elevated L and K scores indicative of attempting to present herself
 12 in a most favorable light; the scores also reflected she was
 13 guarded, defensive and prone to act out inappropriately or through
 14 others who acted inappropriately. (Tr. at 514.) He concluded
 15 Plaintiff suffered from somatoform disorder, with several moderate
 16 limitations. (Tr. at 516-517.)

17 Dr. Toews administered a mental status examination, WMS-III,
 18 Trails A and B and Test of Memory Malingering. (Tr. at 534.) He
 19 noted that Plaintiff presented very differently than as tested. Dr.
 20 Toews diagnosed rule/out malingering, possible somatization disorder
 21 and possible histrionic and passive-aggressive personality traits.
 22 Her GAF was assessed at 75, indicative of only slight limitations.
 23 (Tr. at 538-540.) *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH*
 24 *EDITION (DSM-IV)*, at 32 (1995).

25 When there is a conflict in the medical findings, the ALJ is
 26 responsible for resolving the conflict. *Morgan v. Comm'r of the*
Soc. Sec. Admin., 169 F.3d 595, 603 (9th Cir. 1999). When a
 28 physician relies on "independent clinical findings" in formulating

1 a medical opinion, that opinion may be credited by the ALJ. *Andrews*
 2 v. *Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995); *Magallanes v. Bowen*,
 3 881 F.2d 747, 751 (9th Cir. 1989). In the absence of independent
 4 clinical findings, an opinion of an examining physician may be
 5 disregarded only after setting forth specific, legitimate reasons
 6 based on substantial evidence in the record. *Magallanes*, 881 F.2d
 7 at 751 (citation and internal quotation marks omitted). Here, the
 8 ALJ resolved the conflict between the differing opinions, choosing
 9 to credit that of Dr. Toews. Not only were there independent
 10 clinical findings to support that opinion, but the ALJ gave
 11 specific, legitimate reasons for doing so, including a list of
 12 inconsistent daily activities (Tr. at 525) and failure to
 13 participate in mental health treatment or counseling. These are
 14 legitimate reasons for rejecting a medical opinion. *Rollins v.*
 15 *Massanari*, 261 F.3d 853, 856 (9th Cir. 2001). There was no error in
 16 concluding Plaintiff's mental impairment was non-severe.

17 2. Consulting Physician / Residual Physical Capacity

18 Plaintiff contends the ALJ erred when he concluded she could
 19 perform a full range of light work, with occasional postural
 20 limitations and no work around heights or hazardous machinery.
 21 Plaintiff argues this conclusion was based on the opinion of
 22 consultant Dr. Diane L. Rubin, who examined Plaintiff on only one
 23 occasion, in contrast to treating physician, Dr. David Hurley, who
 24 concluded Plaintiff was severely limited due to coronary artery
 25 disease, hyperlipidemia and hypothyroidism. (Tr. at 479.)

26 In a disability proceeding, the treating physician's opinion is
 27 given special weight because of his familiarity with the claimant
 28 and his physical condition. See *Fair v. Bowen*, 885 F.2d 597, 604-05

(9th Cir. 1989). If the treating physician's opinions are not contradicted, they can be rejected only with "clear and convincing" reasons. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). If contradicted, the ALJ may reject the opinion if he states specific, legitimate reasons that are supported by substantial evidence. See *Flaten v. Secretary of Health and Human Serv.*, 44 F.3d 1453, 1463 (9th Cir. 1995); *Fair*, 885 F.2d at 605. While a treating physician's uncontradicted medical opinion will not receive "controlling weight" unless it is "well-supported by medically acceptable clinical and laboratory diagnostic techniques," Social Security Ruling 96-2p, it can nonetheless be rejected only for "'clear and convincing' reasons supported by substantial evidence in the record." *Holohan v. Massanari*, 246 F.3d 1195, 1202 (9th Cir. 2001) (quoting *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998)). Furthermore, a treating physician's opinion "on the ultimate issue of disability" must itself be credited if uncontroverted and supported by medically accepted diagnostic techniques unless it is rejected with clear and convincing reasons. *Holohan*, 246 F.3d at 1202-03. Historically, the courts have recognized conflicting medical evidence, the absence of regular medical treatment during the alleged period of disability, and the lack of medical findings to support a doctor's report based substantially on a claimant's subjective complaints of pain, as specific, legitimate reasons for disregarding the treating physician's opinion. See *Flaten*, 44 F.3d at 1463-64; *Fair*, 885 F.2d at 604.

In his opinion, the ALJ noted

Although Dr. Hurley found the claimant severely limited on

1 May 9, 2002 due to coronary artery disease;
2 hyperlipidemia; and history of hypothyroidism on a
3 Physical Evaluation form, the undersigned notes this form
4 is shown to be (from the face of the document) a report
5 compiled for public assistance eligibility purposes for
6 use by the Department of Social and Health Services. The
report's findings are not supported by reference to
standardized testing or by the claimant's treating
cardiologist who has recommended prophylactic medication
and yearly follow-up evaluations only, with no functional
limitations assessed by him.

7 The findings at Exhibit B5F [completed by Dr. Hurley] are
8 also not supported by, or consistent with, the more
9 detailed report of consultative examination at Exhibit
B11F [completed by Dr. Rubin]. The latter report is
supported by findings from a clinical interview and
standardized testing for orthopedic and other possible
impairments and accordingly, these findings are afforded
greater weight.

11
12 (Tr. at 357, references to some exhibits omitted.) As noted by the
13 ALJ and confirmed by her treating cardiologist, Plaintiff's post-
operative coronary artery disease did not present any limitations
15 and the only recommendation was follow-up on an annual basis.
16 Additionally, it appears from Dr. Hurley's clinical notes, that the
17 hyperlipidemia and hypothyroidism were well controlled with
18 medication. (Tr. at 489, 490, 504.) Moreover, Dr. Hurley's RFC was
19 not supported by clinical findings. Plaintiff did not report any
20 difficulty walking or standing because of the post-operative knee
21 impairment. (Tr. at 524.) Frequent urinary urges were controlled
22 with medication. (Tr. at 524.) Dr. Rubin's examination revealed
23 normal reflexes, range of motion, muscle strength, grip strength,
24 gross and fine manipulation. Only an inability to perform a full
25 squat was observed due to poor balance. (Tr. at 526.) Finally, Dr.
26 Rubin's assessment of light work capability was supported by other
27 RFC forms in the record and Plaintiff's report of daily activities.
28 (Tr. at 461, 473, 525.) Finally, Plaintiff reported she did not

1 engage in work after 1986 because of "boyfriends." (Tr. at 525.)
2 The ALJ did not err in assessing Plaintiff's residual capacity to be
3 one capable of light work with some postural limitations. (Tr. at
4 358.) Accordingly,

5 **IT IS ORDERED:**

6 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 16**) is
7 **DENIED.**

8 2. Defendant's Motion for Summary Judgment dismissal (**Ct.**
9 **Rec. 19**) is **GRANTED**; Plaintiff's Complaint and claims are **DISMISSED**
10 **WITH PREJUDICE.**

11 3. The District Court Executive is directed to file this Order
12 and provide a copy to counsel for Plaintiff and Defendant. The file
13 shall be **CLOSED** and judgment entered for Defendant.

14 DATED February 9, 2006.

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S/ CYNTHIA IMBROGNO
17 UNITED STATES MAGISTRATE JUDGE
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